

1916247 (Migration) [2020] AATA 4370 (27 August 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1916247

HOME AFFAIRS REFERENCE(S): BCC2018/2349597

MEMBER: P. Maishman

DATE: 27 August 2020

PLACE OF DECISION: Perth

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 27 August 2020 at 9:38am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – application made more than 28 days after last substantive visa held – compelling reasons for not applying criterion – visa history and reasons for overstaying tourist visa – length of time as unlawful non-resident – application for protection visa deemed invalid – sponsor’s physical and mental health – potential emotional and financial hardship – COVID-19 and travel restrictions – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 802.211(2)(d)(ii), Schedule 3, criterion 3001(2)(c)(i)

CASES

Babicci v MIMIA (2005) 141 FCR 285

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 30 May 2016 on the basis of his relationship with his sponsor, [Ms A]. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d) because the applicant did not satisfy the Schedule 3 criteria and there were not compelling reasons for not applying the criteria.
4. The Tribunal exercised its discretion to hold the hearing by telephone. The hearing was held during the COVID-19 pandemic. The Tribunal determined it was reasonable to hold a hearing by telephone, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by telephone.
5. The applicant appeared before the Tribunal on 11 August 2020 to give evidence and present arguments. The Tribunal also received oral evidence from [Ms A]. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
6. The applicant was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The Tribunal had before it a copy of the Department's file containing the visa application and documents provided to the Department in respect of an application. The parties claim to have first met in March 2013 and committed to a shared life together in July 2013. The applicant claims his previously marriage ended in divorce [in] January 2016. The sponsor has one child from her previous marriage which ended in divorce in February 2015. The sponsor was sponsored into Australia. They married in February 2016. The applicant was invited by the Department on 13 May 2019 to provide further evidence of the parties' relationship and details of any compelling reasons to support a waiver of the Schedule 3 criteria. The Department declined the applicant's representatives 10 June 2019 request for an extension of time to provide information. The delegate made its decision on 12 June 2019.
9. The Department's decision record, provided to the Tribunal by the applicant, details that the applicant arrived in Australia [in] April 2011 as the holder of a [Tourist] visa that expired on 8 July 2011. The applicant remained in Australia without a valid visa and applied for a Protection visa on 13 July 2017. The applicant's Protection visa application was deemed invalid on 17 May 2018 and he applied for the Partner visa on 30 May 2018. The delegate

says on 13 May 2019 the Department gave the applicant a written invitation to submit information about compelling factors for consideration and that no response was received.

10. On 22 June 2020 the Tribunal invited the applicant to provide written information about compelling reasons for not applying the Schedule 3 criteria. The applicant provided a statutory declaration signed and dated 6 July 2020 in response.
11. The Tribunal received a further submission from the applicant's representative dated 7 August 2020 including a letter jointly signed by the applicant and sponsor dated 7 August 2020. The submission included a statutory declaration of the applicant dated 12 June 2019 and a brief letter dated 12 June 2019, signed by the applicant and the sponsor addressing the nature of their relationship. The submission included a bundle of documents referred to in a cover letter to the Department dated 12 June 2019. The representative claims these papers were prepared on 12 June 2019, but not provided to the Department because its decision was made before the agent could deliver the submissions to the Department.
12. The Tribunal observed a lot of the documentary evidence received under cover of the letter 12 June 2019 appeared to go to the assessment of the genuineness of the applicant's relationship with the sponsor. The delegate has not assessed the nature of the parties relationship to determine if the applicant is the spouse or de facto partner of the sponsor as defined in s.5F and s.5CB.
13. In accordance the *President's Direction – Conducting Migration and Refugee Reviews* the Tribunal has restricted its review to the matters decided by the delegate.
14. The applicant's representative provided a further submission on 18 August 2020 expressing his concern and the sponsors health. The applicant's submission included a letter from [Dr B] dated 14 August 2020 and details of a medical appointment dated 20 July 2020.
15. The issue in the present case is whether the applicant meets the Schedule 3 criteria or if there are compelling reasons to waive that requirement.

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

16. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
17. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

18. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
19. The delegate's decision record outlines the applicant's visa history and says he last held a substantive Tourist visa on 8 July 2011. The applicant was in Australia and not the holder of a substantive visa when he lodged his Partner visa application on 30 May 2018.

20. The applicant claims in his statutory declaration on 6 July 2020 that he unintentionally overstayed, did not know how to address the issue and resided as an unlawful non-citizen in Australia. The applicant gave oral evidence he agreed the visa history contained in the delegate's decision record is accurate.
21. The Tribunal finds that the applicant last held a substantive visa when his Tourist visa ceased on 8 July 2011. This is the 'relevant day' as defined in criterion 3001(2)(c)(i).
22. The applicant's Partner visa application was made on 30 May 2018 and the Tribunal finds this is more than 28 days after the relevant day.
23. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

24. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
25. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babici v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.

The applicants evidence

26. The Tribunal had regard to the letters signed by the applicant and sponsor dated 12 June 2019 and 7 August 2020; the applicant's statutory declarations signed on 12 June 2019 and 6 July 2020; and the applicants' oral evidence.
27. The applicant claims in his written declarations he entered Australia in April 2011 on a Visitor visa. He was fascinated by Australia and its people and unintentionally overstayed when the visa expired. When he found out, he did not know what to do and continued to reside in Australia as an unlawful noncitizen. He met the sponsor in January 2013 and they married in February 2016.
28. The Tribunal asked the applicant to elaborate on his reasons for overstaying and told the applicant it was concerned he did not appear to do anything about correcting his visa status until he was granted a Bridging visa in respect of his Protection visa application in July 2017. The Tribunal asked the applicant to explain how he supported himself while remaining in Australia.
29. The applicant gave oral evidence that he was tricked by his migration agent in China into believing he had a Work visa when he came to Australia in 2011. He does not read English so could not check his visa type or the visa conditions. The applicant denies he was told at border control in Australia anything about the conditions of his visa. He was picked up at the airport and taken to work. He worked casually for 2 to 3 days a week to pay for his living expenses. About six months after arriving in Australia found out he did not have a visa or work rights. He was scared and didn't know what to do. He asked his landlord who could not help him. The applicant did not dare ask the Department about his visa and he didn't know about the law. The applicant continued to work sporadically for no more than 2 to 3 days a

week to support himself financially. The applicant made his Protection visa application because he was told he might get medical treatment.

30. The applicant has been living with the sponsor since 2013 and they married in February 2016. The applicant loves the sponsor very much and they have been married for four years. Their life will be harder and joyless if they are alone. The applicant claims there is a very real risk the enjoyment of his marriage and family life he knows now will be totally destroyed or severely affected. The applicant helps the sponsor in her small [business], and they work very hard and pay their taxes on time.
31. There are no readily available flights for the applicant to return to China to apply for an offshore partner visa because of the Covid-19 pandemic, and there is no vaccine to prevent the applicant being infected. Australia has indicated a willingness to fast track visa applications made by Hong Kong citizens and China is aggressively asserting military and diplomatic prowess.

The sponsor's evidence

32. The sponsor gave evidence that she had recently been referred to see a psychologist by her general practitioner for symptoms of emotion and sweating. She had not yet attended any sessions. The sponsor said she has received physiotherapy treatment for a dislocated [body part]. She has restricted movement in her [body parts] and the applicant helps her with [the physical work] in her business. She relies on him to assist her with heavy work. Her daughter is an adult and lives in Melbourne so cannot assist her in her business.
33. After hearing the applicant provided a copy of a letter from [Dr B] advising the sponsor suffered mental health issues that he had commenced treating with pharmaceuticals.

Conclusion

34. The Tribunal has considered the factors relevant to the case including those raised by the applicant and the sponsor. The applicant claims the compelling reasons not to apply the Schedule 3 criteria are he overstayed his visa unintentionally; he has been in a long relationship with the sponsor; he helps her with her work; the Covid-19 pandemic; and the deteriorating relationship between China and Australia.
35. The Tribunal attributes no weight to the applicant's submission that he unintentionally overstayed his visitor visa. The applicant arrived in Australia as the holder of a substantive [Tourist] that expired on 8 July 2011. Even if the applicant was tricked by his migration agent into believing he had a work visa as he claims, he was aware that he did not have a valid visa about six months after arriving in Australia and did nothing to regularise his visa status. The applicant remained in Australia unlawfully after his visa expired on 8 July 2011. The applicant met his sponsor in January 2013 and married her in 2016. The applicant took no steps to regularise his visa status.
36. The applicant was not the holder of a substantive or bridging visa from 8 July 2011 until 13 July 2017 when he applied for a Protection visa. The applicant remained in Australia unlawfully for a significant period. The applicant was an adult when he came to Australia. Visa information is available from the Department in a wide range of languages including Mandarin. The onus is on the applicant to know and understand the conditions attached to his visa. The applicant failed to comply with the conditions of his visa by remaining in Australia after the visa expired. The Tribunal is not satisfied the applicant overstayed his visa unintentionally.

37. The applicant's claim to have been tricked by his migration agent into believing he had a work visa and his claimed unintentional overstay are not compelling reasons to waive the Schedule 3 criteria.
38. The Tribunal considered the parties' evidence in relation to the duration of their relationship; the applicant's assistance to the sponsor in her work; and the sponsors claimed medical conditions.
39. The Tribunal acknowledges the parties claim to have been in a relationship with each other since 2013. The criteria which must be met for a Subclass 820 visa include that the applicant is the spouse or de facto partner of the sponsoring partner and this, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. Accordingly, simply the fact that the parties are in a genuine and continuing relationship is not of itself a compelling reason for not applying the Schedule 3 criteria as it is already a criterion which must be satisfied in order to meet the criteria in cl.820.211(2)(a). If the relationship itself can be considered a compelling reason for not applying the Schedule 3 criteria, it must be the particular aspects of the relationship which must provide a compelling reason for not applying the Schedule 3 criteria and not simply the fact that the parties are in a relationship.
40. The Tribunal has not considered the genuineness of the parties' relationship however in the circumstances of this case the Tribunal does not consider the length of the relationship, or any particular aspects of the relationship between the applicant and the sponsor, even if a genuine relationship was established, constitute a compelling reason for waiver of the Schedule 3 criteria.
41. After the hearing the applicant gave the Tribunal a letter showing the sponsor had an appointment with [Dr C] of Orthopaedics on 18 August 2020. The appointment does not give any information about the condition for which the appointment has been made. The sponsor said she had a [body part] dislocation and needed time to recover. She said she has recovered from previous operations but now suffers emotional conditions and sweating, she thinks related to her age. There is no medical evidence before the Tribunal that supports the parties' claim the applicant is required to assist the sponsor in her [business] with duties such as [physical work] because she has a [body part] condition. The letter from the sponsors consultant psychiatrist dated 14 August 2020 indicates he has started the sponsor on medication to treat major depression and mood-congruent psychotic symptoms and certifies the sponsor is medically unfit to work. The letter from the sponsor's consultant psychiatrist does not describe any prognosis for the sponsor's mental health condition.
42. The Tribunal acknowledges the applicant helps the sponsor in her business, however there is no medical evidence before the Tribunal supporting the parties' submission that her [condition] precludes her undertaking work related functions such as mopping and sweeping. The Tribunal acknowledges the sponsor was certified medically unfit for work on 14 August 2020. There is no evidence before the Tribunal that indicates for how long the sponsor might be unfit for work. The Tribunal acknowledges the representative's submission on 18 August 2020 that the sponsor may need rely on Centrelink payments if the applicant is not in Australia to assist her work.
43. The Tribunal accepts the parties' submissions that they might suffer financial hardship in the event the applicant was required to go offshore. It is not uncommon that people who seek to apply for a partner visa and are required to do so from offshore and so do not have the benefit of pooling their financial means and so experience a degree of financial hardship. If the sponsor is unable to continue her business for a time she will be able to rely on Centrelink payments. While this would be an unfortunate situation for the sponsor, the Centrelink system provides a safety net for eligible people to receive income support. The

applicant claims there is a very real risk the enjoyment of his marriage and family life he knows now will be totally destroyed or severely affected. The Tribunal notes that many visa applicant's in this situation rely on the use of electronic media to maintain their communication and personal contact. There is no evidence before the Tribunal that the applicant and sponsor cannot maintain their relationship in this way.

44. Although not raised specifically by the applicant or the sponsor, the Tribunal acknowledges the medical evidence indicates the sponsor may be susceptible to emotional hardship if the applicant were required to leave Australia to make a visa application.
45. The Tribunal does not consider the potential emotional or financial hardship the parties might suffer to be a compelling reason to waive the Schedule 3 criteria.
46. The Tribunal considered the applicant's claim there no coronavirus vaccine had developed. He claims the Covid 19 pandemic had resulted in many nations closing their borders and there being no readily available flight for the him to return to China. The applicant said there was no prevention from him being infected with Covid 19 if he returned to China.
47. The applicant told the Tribunal he had taken no steps to attempt to get a flight to China. The applicant gave no evidence indicating that China had closed its borders to returning citizens. The Tribunal acknowledges that travel in the current conditions may be restricted and more expensive however does not consider these to be compelling reasons for not applying the Schedule 3 criteria.
48. The Tribunal acknowledges that the current pandemic conditions raise significant health concerns. There is no evidence the applicant's risk of contracting Covid 19 if he returns to China is any greater risk of contracting Covid 19 in Australia. The Tribunal does not consider the comparative risk of contracting Covid 19 to be a compelling reason not to apply the Schedule 3 criteria.
49. The Tribunal considered the applicant's claim he is fearful that there is tension between the Chinese and Australian governments which may result in his freedom and liberty being affected if he returned to China. The applicant was unable to articulate the nature of how this might him personally and provided no evidence that people returning to China from Australia experience any particular difficulties. The Tribunal does not consider there is any particular difficulty with the applicant returning to China that would be a compelling reason not to apply the Schedule 3 criteria.
50. The Tribunal is mindful that the applicant has found himself in this position due to his breach of Australia's immigration law. The Tribunal cannot however make a decision predominantly based on the applicant's migration history. In assessing whether there are compelling reasons for waiving the Schedule 3 criteria, the Tribunal is required to assess the evidence as a whole.
51. The Tribunal has considered the totality of the applicant's and sponsor's circumstances.
52. Having considered the circumstances singularly and cumulatively, the Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).
53. There is no evidence or suggestion the alternative criteria in cl.820.211 (2A), (2B), (5)-(9) apply.
54. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

55. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

P. Maishman
Member

ATTACHMENT - Extract from Migration Regulations 1994

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.